82-795

Office - Supreme Court, U.S.
FILED
NOV 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES
TERM 1982

MARY C. SMITH, CAROL R. DIMAIO,
and HOWARD E. WATTS, JR.,

Howard E. Watts, Jr., Petitioner

vs.

JOSEPH HORNE COMPANY, INC.,
a Pennsylvania corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARNOLD M. FRIEDMAN, ESQ.
EDWARD B. FRIEDMAN, ESQ.
FRIEDMAN and FRIEDMAN
Attorneys at Law
600 Arrott Building
Wood Street & 4th Ave.
Pittsburgh, PA 15222
(412) 261-5834

Attorneys for Petitioner

QUESTIONS PRESENTED

The lower court found that petitioner Watts made out a prima facie case of retaliatory firing and discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 by presenting evidence that shortly before he was laid off, respondent Horne's threatened to lay him off because the female plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him. The lower court did not, however, find in favor of petitioner Watts, but instead concluded that petitioner Watts did not carry his burden of persuasion in the face of evidence presented by respondent of greatly declining sales and contractual obligations to reduce the work force in order of seniority. The lower court made no finding as to whether

discriminatory motive was a substantial factor in the layoff of Watts. The question presented is:

1. Whether the Court erred in finding that petitioner Watts did not carry the burden of proving a discriminatory layoff where the evidence established that respondent's desire to remove him as the male basis of comparison to the female plaintiffs was a substantial factor in the layoff.

2. Whether the Court erred in refusing to make any finding as to whether discriminatory motive was a substantial factor in the determination to lay off Watts.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASON FOR GRANTING THE PETITION..	14
CONCLUSION.....	23
APPENDIX A - JUDGMENT ORDER.....	A-1
B - SUR PETITION FOR HEARING.....	B-1
C - FINDING OF FACT AND CONCLUSIONS OF LAW...	C-1
D - ORDER.....	D-1

TABLE OF AUTHORITIES

CASES: PAGE

Goodwin v. City of Pittsburgh, 480 F. Supp. 627 (W.D. Pa., 1979) aff'd 624 F.2d 1090 (3d Cir., 1980)..... 21

Hill v. United States Postal Service, 522 F. Supp. 1283, 1303 (S.D. N.Y., 1981)..... 18

Laugesen v. Anaconda, 510 F.2d 307 (6th Cir., 1975).....18, 19

Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, (E.D. Mich., 1976).....18, 19

Smithers v. Bailar, 629 F.2d 892 (3d Cir., 1980).....17, 18, 21, 22

Constitution, statutes and regulations:

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634..... 17

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.....4, 5, 15, 16 18, 21, 23

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRIEDMAN and FRIEDMAN and ARNOLD M. FRIEDMAN and EDWARD B. FRIEDMAN, on behalf of petitioner HOWARD E. WATTS, JR., petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the Court of Appeals in the consolidated appeals appears in Appendix A to this Petition and is not reported. The Order of the Court of Appeals denying the Petition for Rehearing En Banc appears in Appendix B and is not reported. The District Court's Finding of Facts and Conclusions of Law appear in Appendix C. No opinion was rendered by the District Court. The Order of the District Court Amending its Findings of Fact and Conclusions of Law appears in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1982. (Appendix A, infra, p. A-3) A timely petition for rehearing en banc was denied on August 24, 1982. (Appendix B, infra, p. B-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no statutory provisions pertinent to the questions presented in this petition.

STATEMENT OF THE CASE

1. This case involves the claim by a male petitioner, Howard E. Watts, Jr., that his layoff on July 8, 1972, by respondent Joseph Horne Company was retaliatory and discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq., as amended. Petitioner Watts and the two female plaintiffs, Smith and DiMaio, filed a joint Complaint in the District Court alleging that they were wig stylists at respondent company and that they all performed substantially the same work, but that the male petitioner, Watts, was paid a considerably larger salary than the female plaintiffs, Smith and DiMaio. Plaintiffs further alleged that on or about July 8, 1972, petitioner Watts was laid off by respondent in an attempt to remove the male basis

of comparison with the female plaintiffs.

2. The United States District Court for the Western District of Pennsylvania (the Honorable Alan N. Bloch) held in favor of the female plaintiffs, finding that they were discriminated against on the basis of sex in violation of Title VII, Appendix at A-999, and awarded back wages with interest to date of trial. Appendix at A-1000. With respect to petitioner Watts, however, the lower court found that although he made out a prima facie case of retaliatory firing and discrimination by presenting evidence that shortly before he was laid off, respondent Horne's threatened to lay him off because the female plaintiffs filed charges with the EEOC, he, nevertheless, failed to carry his burden of persuasion

in the face of evidence of respondent's greatly declining wig sales. The lower court entered judgment against petitioner Watts and in favor of respondent. Appendix at A-1000.

3. Plaintiffs Smith and DiMaio first became aware of the wage disparity between them and petitioner Watts in or about the end of April or beginning of May, 1972. Appendix at A-250. They complained to their union representative and, on June 6, 1972, Russell Klaypach, Business Agent for Local 1407 of the Retail Store Employees Union, approached Robert Neal, then Horne's Labor Relations Manager, and asked him to increase Smith's and DiMaio's wages to equal the wages of Watts. [Finding of Fact No. 29] Appendix at A-997. See also Stipulations Nos. 25, 26, and 27, Appendix

at A-707. Thereafter, following June 6, 1972, when respondent Horne's first learned that the female plaintiffs were complaining that they were paid less than Watts for doing the same work, a series of events occurred in rapid succession which culminated in Watts' layoff on July 8, 1972. In this period of little over a month between June 6, 1972, and July 8, 1972, the following occurred:

a. Robert Neal, the respondent's Labor Relations Manager, informed Lawrence F. Stoneberg, then Vice-President and General Superintendent, that he had received Russell Klaypach's telephone call. Neal told Stoneberg that he had a phone call from Russell Klaypach that two of the people in the department [the Wig and Millinery Department] were

complaining about a rate inequity and they were comparing themselves and their rate against Mr. Watts. Appendix at A-846.

When Stoneberg first learned of the female plaintiffs' wage disparity claim, his response was to tell Neal to advise Klaypach that layoffs are pending. Russell Klaypach, the union representative, testified that he had heard no mention of layoffs in the Wig and Millinery Department until June 26, 1972, when he met with Neal to discuss the female plaintiffs' claim of wage disparity.

b. On June 10, 1972, Watts was called in to the office of Robert Rieland, then respondent's General Merchandise Manager, at which time Rieland indicated displeasure with Watts' low sales and

with other aspects of Watts' performance.

At the time of this warning, the respondent Joseph Horne Company was already aware of the claim by Smith and DiMaio that they were being paid substantially less than Watts for performing the same work. The warning notice was blank when it was given to Watts to sign. Watts' book or selling costs were never before mentioned to him by respondent Horne's throughout his entire employment with Horne's, except on June 10, 1972, the time of the pretextual warning notice, and no complaint was ever made to Watts about his sales performance before this date. Moreover, Joanne Govannini, the then Buyer for respondent's Wig and Millinery Department, testified that there was no custom of reviewing an employee's book or selling

costs with him and that employees in the department had no access to such information. Appendix at A-662. Indeed, Govannini testified that she did not look at selling costs on an individual basis, but, rather, "looked at it as a department total." Appendix at A-662.

The warning of Watts and the warning notice to Watts were an attempt to create a pretext for firing Watts when Horne's already knew of the female plaintiffs' wage disparity claim although respondent does not now contend that Watts was laid off pursuant to the warning notice or as a result of his own sales, but contends that he was fired as a result of a general reduction in force in the Wig and Millinery Department.

c. On June 14, 1972, Russell

Klaypach sent a letter to Robert Neal formally demanding equal pay for plaintiffs Smith and DiMaio. [Plaintiffs' Exhibit No. 23.] Appendix at A-1023.

d. On June 26, 1972, Russell Klaypach, the union representative, met with Neal for lunch in an attempt to resolve the wage discrepancy. Appendix at A-488. At this meeting, Klaypach told Neal "that the girls were contemplating some further action" and that he "thought we could settle it for a reasonable figure." Appendix at A-488. Neal responded that "he couldn't do that" and also stated "that if Mr. Watts were laid off, we wouldn't have a problem". Appendix at A-488. Klaypach took this as a threat to lay off petitioner Watts. Appendix at A-488. The lower court credited Klaypach's testimony and

found that respondent Horne's had threatened to lay off petitioner Watts.

e. On July 8, 1972, petitioner Watts was laid off, twelve days after Neal threatened Klaypach to solve the female plaintiffs' wage disparity claim by threatening to lay him off and nine days after the female plaintiffs filed their charges with the EEOC.

4. The respondent contends that the layoff of Watts was due to a reduction in force in the Wig and Millinery Department, and in this regard, the lower court found that in 1971 and 1972 sales of wigs declined steadily at Horne's. [Finding of Fact No. 27.] Appendix at A-997. Petitioner Watts does not dispute the lower court's finding with regard to decline in sales

and procedure for layoffs, [Findings of Fact Nos. 27, 35] Appendix at A-997-998, but contends that the layoff of Watts on July 8, 1972, was the means by which respondent Horne's sought to remove the male basis of comparison with the female plaintiffs and that Watts was laid off pursuant to the June 26 threat by Neal. Petitioner contends and the evidence supports that discriminatory motive, that is, the desire to remove Watts as the male basis of comparison for the equal pay claims of the female plaintiffs, was the reason for Watts' layoff on July 8, 1972, or at the very least, was a determinative or substantial cause of the layoff.

5. Petitioner Watts filed a Motion To Amend and Supplement Findings of Fact and Conclusions of Law requesting

the lower court to find that the request by the female plaintiffs to increase their wage to the wages of Watts was a "substantial factor in the layoff of Watts" (Appendix at A-1002) and to conclude that respondent Horne's discriminated against Watts because of his sex and in retaliation for the charges of the female plaintiffs (Appendix at A-1004). The lower court denied petitioner's request (Appendix at A-1013) and made no finding as to whether discriminatory motive was a substantial factor in the determination to lay off Watts.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the standard of causation to be applied where there is

an issue of mixed motives in proving a discriminatory discharge. The question is of profound significance in proving violations of Title VII of the Civil Rights Act of 1964.

The judgment of the District Court, affirmed in a brief Judgment Order by the Court of Appeals, was based on findings of fact and conclusions of law made by the Court. There was no opinion by the Court in support of its decision. Moreover, the Court did not address the question of mixed motivation in proving a discriminatory discharge.

The findings of fact and conclusions of law of the lower court, together with the stipulations of the parties at trial, implicitly require a finding in favor of Watts. Watts presented

substantial direct and circumstantial evidence that respondent Horne's motive in laying him off was wrongful. Even if the decline in sales was also a factor in the decision to lay him off, the layoff still violated Title VII of the Civil Rights Act of 1964 as discriminatory motive was a "determinative factor" in the layoff. The decision of the court below, that Watts did not carry his burden of persuasion in the face of evidence presented by respondent of greatly declining sales and contractual obligations to reduce the work force in order of seniority is in conflict with the decisions of the Third Circuit Court of Appeals and the decisions of other courts of appeal. Moreover, the standard of causation should be resolved by this Court since the issue in the present case will continue to arise whenever an

employer can articulate a legitimate non-discriminatory motive for a discharge after a plaintiff has proved a prima facie case of discrimination.

The standard of causation to be applied where there is an issue of mixed motives has been the subject of various formulations in the different courts of appeal. In Smithers v. Bailar, 629 F.2d 892 (3d Cir., 198[illegible] the Third Circuit Court of Appeals dealt with the issue in the context of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634. In Smithers, the Court adopted the rule that improper motive must be "a determinative factor" in order to impose liability, that is, that a plaintiff need not prove that age was the employer's sole or exclusive consideration, but only that age made a

difference in the determination. The rule enunciated in Smithers appears to be equally applicable to the Title VII situation. Indeed, Smithers has been cited as authority in the Title VII context in Hill v. United States Postal Service, 522 F. Supp. 1283, 1303 (S.D.N.Y., 1981).

The rule as enunciated in Smithers that the discriminatory motive must be a determinative factor is elaborated upon by the Smithers court in its discussion of Laugesen v. Anaconda, 510 F.2d 307 (6th. Cir., 1975) and Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, (E.D. Mich., 1976), relied upon by the lower court. The court in Smithers stated:

> "... In Laugesen, a discriminatory discharge case, the court employed a

two-part test for deciding ADEA claims: first, plaintiff must show that age was one factor considered by the employer and second, plaintiff must prove that age made a difference in the disputed decision. 510 F.2d at 317. The Laugesen court, reciting the familiar tort law principle that there may be more than one proximate cause of an event, held that plaintiff need not prove age to be the sole or exclusive cause of the action. Rather plaintiff must establish that age played a part in the decision, even though the employer could demonstrate strong and perhaps more compelling non-discriminatory reasons for his actions. The Mastie court interpreted Laugesen to mean that the employer's consideration of age must have been 'a determinative factor' in the decision. 424 F. Supp. at 1321-22... [Footnote omitted; Emphasis added] 629 F.2d at 897."

The evidence adduced at trial in the instant case clearly indicates that the desire to remove Watts as the male basis of comparison and thereby to defeat the claims of the female plaintiffs "made a difference" in the decision to lay off Watts on July 8, 1972. Watts was threatened and the threat was carried

out when he was laid off on July 8, 1972, a little over a month after Horne's first learned of the female plaintiffs' claim.

Moreover, Watts' claim is reinforced by the context of discrimination in which the events leading to his layoff on July 8, 1972, occurred. There is strong evidence of discriminatory animus both in the pretextual warning of Watts of June 10, 1972, and in the threat to lay him off which preceded his layoff. The fact that the respondent was actively discriminating against the female plaintiffs at the very same time these events occurred is additional strong circumstantial evidence that discriminatory motive was a substantial or determinative factor in the layoff of Watts on July 8, 1972.

The Title VII cases found in the Third Circuit which discuss the standard of causation to be applied when there is an issue of mixed motives appear to state a less stringent standard than that enunciated in Smithers. In Goodwin v. City of Pittsburgh, 480 F. Supp. 627 (W.D. Pa., 1979), affirmed per curiam, 624 F.2d 1090 (3d Cir., 1980), the rule was stated that when it is shown that an improper motive was "at least in part a factor" then the termination violates Title VII.

In the instant case, petitioner Watts should prevail whether the Goodwin standard or the Smithers standard is applied because Watts met his burden of proof in showing that discriminatory animus was a substantial part of respondent Horne's motive in laying him off.

By concluding that although Watts made out a prima facie case of retaliatory firing and discrimination, he did not meet his burden of persuasion in the face of evidence presented by respondent of declining sales, the lower court disregards the applicable standard of causation. It is submitted that had the lower court applied the Smithers rule, which is the appropriate legal standard, it would have found for Watts despite the evidence submitted by respondent of declining sales. Improper motive must only be a determinative factor in order to impose liability for discriminatory discharge and a plaintiff need not prove it to be the sole or exclusive cause of the action. The lower court's conclusion that Watts did not carry his burden of persuasion in the face of respondent's evidence of declining sales was therefore

an error. Particularly in view of the effect of this decision in proving discrimination under Title VII and the failure of the Court of Appeals to follow its own decisions, review of the decision below is essential.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
FRIEDMAN and FRIEDMAN

By _____
Arnold M. Friedman

By _____
Edward B. Friedman

600 Arrott Building
Wood Street & 4th Ave.
Pittsburgh, PA 15222
(412) 261-5834

Dated: November 3, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1373, 81-1374,
81-2996 and 81-3067

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

Howard E. Watts, Jr., plaintiff in
D.C. Civil No. 75-0964,

Appellant in No. 81-1373

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

JOSEPH HORNE COMPANY, INC., defendant in D.C. Civil No. 75-0964,

Appellant in No. 81-1374

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303

JOSEPH HORNE COMPANY, INC., defendant in D.C. Civil No. 75-0964,

Appellant in 81-2996

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

Howard E. Watts, Jr., plaintiff in D.C. Civil No. 75-0964,

Appellant in No. 81-3067

Appeal from the United States District Court for the Western District of Pennsylvania - Pittsburgh

---

Submitted Under Third Circuit Rule 12(6)
August 4, 1982
Before: ALDISERT and WEIS, Circuit Judges, and RE, Chief Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant and cross-appellant, and for the reasons set forth in the district court opinion by the Honorable Alan N. Bloch, Smith v. Joseph Horne Co., Civ. Nos. 75-964, 77-1303 (W.D.Pa. Oct. 1, 1980); it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Parties to bear their own costs.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/Sally Mrvos
Sally Mrvos, Clerk

DATED: Aug. 4 - 1982

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1373/74,
81-2996 & 81-3067

MARY C. SMITH, et al.

vs.

JOSEPH HORNE COMPANY, INC.,
et al.

(W.D. Pa. - Pgh. - Civil Nos.
75-0964, 77-1303)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, SLOVITER and BECKER,
Circuit Judges, and RE, Chief Judge.*

The petition for rehearing filed by

Howard E. Watts, Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: Aug. 24, 1982

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR.,	)	
Plaintiffs,	)	
vs.	)	Civil Action Nos. 75-964 77-1303
JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation,	)	
Defendant.	)	

FINDINGS OF FACT

1. Plaintiffs Smith, DiMaio, and Watts are all individuals who reside in the Western District of Pennsylvania.

2. Defendant Joseph Horne Company is a Pennsylvania corporation engaged in an industry affecting commerce, to wit: retail merchandising, and has employed fifteen or more employees for each working day in each of twenty or more calendar weeks in the current and

preceding years.

3. Plaintiffs Smith and DiMaio filed charges with the Equal Employment Opportunity Commission (EEOC) on June 29, 1972, alleging they did the same work as plaintiff Watts but were paid less by Defendant Horne's.

4. Plaintiff Smith filed additional charges with the EEOC on July 8, 1972, alleging that Plaintiff Watts had been laid off by Defendant Horne's in retaliation for their original charges.

5. Plaintiff DiMaio filed additional charges with the EEOC on July 15, 1972, alleging the same thing.

6. Plaintiff Watts filed a charge with the EEOC on July 11, 1972, alleging he had been laid off by Defendant Horne's in retaliation for the Smith and DiMaio charges.

7. Plaintiff Smith filed a third

charge with the EEOC on February 18, 1975, alleging harrassment by Defendant Horne's in further retaliation for her earlier charges.

8. The EEOC granted Plaintiffs Smith, DiMaio and Watts right to sue letters with respect to all charges filed in 1972 on June 10, 1975. The suit at Civil Action No. 75-964 was filed within 90 days thereafter. The EEOC granted Plaintiff Smith a right to sue letter with respect to her 1975 charge of retaliation on May 18, 1976. Plaintiff Smith moved to amend her complaint at Civil Action No. 75-964 to include her retaliation charge within 90 days thereafter. However, the Court denied the motion to amend the complaint and a motion to reconsider. Plaintiff Smith thereafter timely filed a second suit at Civil Action No. 77-1303 alleging

retaliation.

9. Defendant Horne's principal place of business is located at 501 Penn Avenue, Pittsburgh, Pennsylvania. This location is referred to as the Downtown or Main Store. Defendant Horne's also has numerous branch stores in locations surrounding Pittsburgh.

10. Plaintiff DiMaio was first employed as a wig stylist by the Defendant Horne's in the Wig and Millinery Department of the Downtown Store on February 2, 1970.

11. Plaintiff Smith was first employed as a wig stylist by the Defendant Horne's at one of its branch stores on July 9, 1965. She was transferred to the Wig and Millinery Department in Horne's Downtown Store on February 9, 1970.

12. Plaintiff Watts was first

employed as a wig stylist by the Defendant Horne's in the Wig and Millinery Department of the Downtown Store on March 24, 1970.

13. At the time of her hiring, the Plaintiff DiMaio had an Ohio beauty operator's license representing 1,250 hours of training. She also had had 900 hours of training toward her Ohio teacher's license. She was also able to cut and style raw wigs. Prior to her hiring by Horne's, the Plaintiff DiMaio had worked for several years as a wig stylist in the wig department of the Strauss-Hirschberger department store in Youngstown, Ohio. Her duties at that store were to fit and style wigs and to conduct promotional demonstrations of wig styling. Plaintiff DiMaio also worked briefly as a wig stylist at Kaufmann's in Pittsburgh prior to going to Horne's.

14. At the time of her hiring, the Plaintiff Smith had a Pennsylvania beauty operator's license representing 1,000 hours of training. She had also taken a 160-hour advanced hair styling course, and a 160-hour advanced hair coloring course. She was also able to cut and style raw wigs and do blending. Prior to her transfer to Horne's Downtown Store, the Plaintiff Smith had worked at the Horne's South Hills Store as a wig stylist. Her duties at that store were to fit and style wigs and to conduct promotional demonstrations of wig styling.

15. At the time of his hiring, the Plaintiff Watts had a Pennsylvania beauty operator's license representing 1,000 hours of training. He also had a Pennsylvania teacher's license representing 500 hours of training. He was not able to cut and style raw wigs or do blending.

Prior to his hiring by Horne's, he had worked for several years for Abbott Tresses, a wig manufacturer, as a wig stylist whose primary duty was to conduct promotional demonstrations of wig styling.

16. Raw wigs, as opposed to pre-styled wigs, are not ready to wear, but must be cut and styled to the customer's specifications. A pre-styled wig is already cut and styled, but may need further cutting and styling to meet the customer's needs.

17. Cutting and styling raw wigs requires more effort and skill than does the styling of pre-cut and pre-styled wigs.

18. Blending is a process by which different colors of hair fiber are put together to make a natural-looking partial wig or wiglet.

19. At the time she was hired by

the Defendant Horne's, Plaintiff DiMaio was paid $1.95 per hour. On March 24, 1970, she received a raise to $2.050 per hour; on August 30, 1970, she received a raise to $2.100 per hour; on February 15, 1971, she received a raise to $2.510 per hour; on February 14, 1972, she received a raise to $2.640 per hour; on February 13, 1973, she received a raise to $2.740 per hour; on February 18, 1974, she received a raise to $2.840 per hour; on February 15, 1975; she received a raise to $2.940 per hour; on February 16, 1976, she received a raise to $3.190 per hour; on February 14, 1977, she received a raise to $3.390 per hour; on February 13, 1978, she received a raise to $3.590 per hour; and on February 11, 1979, she received a raise to $3.890 per hour.

20. At the time of her transfer to

the Defendant Horne's Downtown Store, Plaintiff Smith was paid $2.29 per hour. On March 30, 1970, she received a raise to $2.38 per hour; on February 15, 1971, she received a raise to $2.51 per hour; on February 14, 1972, she received a raise to $2.64 per hour; on February 17, 1973, she received a raise to $2.74 per hour; on February 18, 1974, she received a raise to $2.84 per hour; and on February 17, 1975, she received a raise to $2.94 per hour.

21. At the time he was hired by the Defendant Horne's, Plaintiff Watts was paid $2.875 per hour. On April 14, 1970, he received a raise to $3.25; on February 15, 1971, he received a raise to $3.38 per hour; and on February 14, 1972, he received a raise to $3.51 per hour.

22. During her employment with the

Defendant Horne's, the Plaintiff DiMaio's duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs and wig accessories; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to blend new hair pieces; to participate in promotional demonstrations; to take inventory; and to help train new personnel in the department.

23. During her employment with the Defendant Horne's, the Plaintiff Smith's duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs and wig accessories; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to blend new hair pieces; to participate in promotional demonstrations; to take inventory; and

to train new personnel in the department.

24. During his employment with the Defendant Horne's, the Plaintiff Watts' duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to participate in promotional demonstrations; to take inventory; and to train new personnel in the department. In addition, from the time of his hiring until September, 1971, the Plaintiff Watts made frequent trips to Horne's branch stores to perform promotional demonstrations, train personnel and check and transfer inventory.

25. A promotional demonstration consisted of styling a wig for a customer in view of the general public. These demonstrations were sometimes preceded

by newspaper advertisements.

26. Only Plaintiff Watts was ever mentioned by name in a newspaper advertisement for a promotional demonstration.

27. In 1971 and 1972, sales of wigs declined steadily at Horne's. Net sales for Horne's Wig and Millinery Department at all stores declined from $376,771 in 1970 to $237,458 in 1971 and to $198,699 in 1972, representing a 37% percent drop in 1971 and a 16.3% drop in 1972. Net sales for the Wig and Millinery Department in the Downtown Store declined from $275,007 in 1970, to $190,040 in 1971, and to $153,090 in 1972 representing a 30.9% drop in 1971, and a 19.4% drop in 1972.

28. Local 1407 of the Retail Store Employees Union represented all employees in the Horne's Wig and Millinery

Department, except supervisory personnel.

29. On June 6, 1972, Russell Klaypach, the business agent of Local 1407, approached Robert Neal, then Horne's labor relations manager, and asked him to increase Smith's and DiMaio's wages to equal the wages of Watts.

30. On June 12, 1972, Watts was asked to come to the office of Robert Rieland, then Defendant's General Merchandise Manager, and Rieland indicated displeasure with Watts' low sales and with other aspects of Watts' performance.

31. Wig stylists made sales of their own and often spent considerable time in styling wigs for salespersons, who would then get credit for the sales.

32. On June 26, 1972, Klaypach had lunch with Neal and Neal remarked to Klaypach that if Watts was not an employee of the Wig and Millinery Department,

Horne's would not have a problem.

33. On July 6, 1972, Dorys Klein, the only "extra" wig stylist in the Wig and Millinery Department was laid off from that Department.

34. An "extra" employee at Horne's is not a full-time, regular employee, but rather, works only when needed.

35. The collective bargaining agreement between Horne's and Local 1407 provided that in cases of lay-offs due to a reduction in force, all "extra" employee in a department must be laid off before any regular employees. After all "extra" employees are laid off, regular employees are laid off according to seniority, those with the least seniority being laid off first.

36. On July 8, 1972, Plaintiff Watts was laid off from the Wig and Millinery Department by the Defendant

Horne's.

37. At the time of Watts' lay-off, Watts was the least senior member of the Wig and Millinery Department at the Downtown Store.

38. Wig sales continued to decline throughout 1973, 1974 and 1975.

39. On February 3, 1975, Plaintiff Smith was laid off from the Wig and Millinery Department at the Downtown Store.

40. At that time, Smith was the least senior member of the Department.

41. After her lay-off on February 3, 1975, Smith was temporarily transferred to various other departments in the Downtown Store.

42. Effective August 9, 1975, Smith voluntarily resigned from Horne's to take another job.

43. Effective November 1, 1979,

DiMaio voluntarily resigned from Horne's.

44. Had the Plaintiff DiMaio, during the course of her employment with the Defendant Horne's, received the same wages as the Plaintiff Watts did receive and would have received had he continued as an employee of Horne's as long as DiMaio, she would have received $21,461.00 more than she did receive.

45. Six percent interest computed each year until time of trial on the wage differential is $8,807.32.

46. Had the the Plaintiff Smith, during the course of her employment with the Defendant Horne's, received the same wages as the Plaintiff Watts did receive and would have received had he continued as an employee of Horne's as long as Smith, she would have recieved $11,706.60 more than she did receive.

47. Six percent interest computed

each year until time of trial on the wage differential is $5,585.92.

Date: 10/1/80

s/ Alan N. Bloch
United States District Judge

cc: Arnold Friedman, Esquire
600 Arrott Building
Pittsburgh, PA 15219.

James R. Williams, Esquire
261 Madison Avenue
New York, NY 10016.

Edward J. Van Allen, Esquire
1500 Oliver Building
Pittsburgh, PA 15222

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR.,	)	
Plaintiffs,	)	
vs.	)	Civil Action Nos. 75-964 77-1303
JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation,	)	
Defendant.	)	

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this suit pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e.

2. During the course of their employment by the Defendant Joseph Horne Company, Plaintiffs Smith and DiMaio performed substantially similar work as Plaintiff Watts, requiring substantially

the same skill, effort and responsibility.

3. Defendant Joseph Horne Company discriminated against Plaintiffs Smith and DiMaio on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e.

4. Plaintiff Watts made out a prima facie case of a retaliatory firing and discrimination on the basis of sex by presenting evidence that shortly before he was laid off, the Defendant Horne's threatened to lay him off because Plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him.

5. However, Plaintiff Watts did not carry his burden of persuasion in the face of evidence presented by the Defendant Horne's of greatly declining wig sales and contractual obligations to

reduce the work force in order of seniority.

6. Defendant Joseph Horne Company did not discriminate against Plaintiff Watts either because of his sex or in retaliation for the EEOC charges of Smith and DiMaio.

7. Plaintiff Smith made out a prima facie case of retaliatory harrassment and constructive firing by presenting evidence that she was laid off from the Wig and Millinery Department and thereafter assigned to numerous different departments until she resigned.

8. However, Plaintiff Smith did not carry her burden of persuasion in the face of evidence presented by the Defendant Horne's of a continuing decline in wig sales and contractual obligations to reduce the work force in order of seniority.

9. Defendant Joseph Horne Company did not discriminate against Plaintiff Smith in retaliation for her filing of charges with the EEOC.

WHEREFORE, judgment be and hereby is entered in Civil Action No. 75-964 for the Plaintiff, Carol R. DiMaio, in the amount of $30,268.32, representing the amount of additional wages she would have received during the course of her employment with Horne's but for the discrimination of the Defendant and interest to date of trial, and against the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 75-964 for the Plaintiff, Mary C. Smith, in the amount of $17,292.52, representing the amount of additional wages she would have received during the course of her

employment with Horne's but for the discrimination of the Defendant and interest to date of trial, and against the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 75-964 against the Plaintiff, Howard E. Watts, Jr., and for the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 77-1303 against the Plaintiff, Mary C. Smith, and for the Defendant, Joseph Horne Company, Inc.

Date: 10/1/80

s/ Alan N. Bloch
United States District Judge

cc: Arnold M. Friedman, Esquire
600 Arrott Building
Pittsburgh, PA 15219.

James R. Williams, Esquire
261 Madison Avenue
New York, NY 10016.

Edward J. Van Allen, Esquire
1500 Oliver Building
Pittsburgh, PA 15222

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR., Plaintiffs, vs. JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation, Defendant.	Civil Action No. 75-964
MARY C. SMITH, Plaintiff vs. JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation, Defendant	Civil Action No. 77-1303

ORDER

AND NOW, this 22nd day of January, 1981, upon consideration of Plaintiffs' Motion to Amend and Supplement Findings of Fact and Conclusions of Law filed in

the above captioned matter on October 14, 1980,

IT IS HEREBY ORDERED that the amendment of Finding of Fact No. 30 is GRANTED and that Finding of Fact No. 30 be and hereby is amended to read:

> 30. On June 10, 1972, Watts was asked to come to the office of Robert Rieland, then Defendant's General Merchandise Manager, and Reiland indicated displeasure with Watts' low sales and with other aspects of Watts' performance.

IT IS FURTHER ORDERED that the amendment of Finding of Fact No. 24 and Plaintiffs' Motion to make Supplemental Findings of Facts and Conclusions of Law are DENIED.

s/ Alan N. Bloch
United States District Judge

cc: Arnold M. Friedman, Esquire
600 Arrott Building
Pittsburgh, PA 15219.

James R. Williams, Esquire
261 Madison Avenue
New York, NY 10016.

Edward J. Van Allen, Esquire
1500 Oliver Building
Pittsburgh, PA 15222

Office - Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-795

IN THE SUPREME COURT OF
THE UNITED STATES
TERM 1982

MARY C. SMITH, CAROL R. DIMAIO,
and HOWARD E. WATTS, JR.,

Howard E. Watts, Jr., Petitioner,

vs.

JOSEPH HORNE COMPANY, INC.,
a Pennsylvania corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF RESPONDENT JOSEPH HORNE COMPANY

Judd N. Poffinberger, Jr.
(Counsel of Record)
Edward J. Van Allen
Rodney G. Hoffman
KIRKPATRICK, LOCKHART,
JOHNSON & HUTCHISON
1500 Oliver Building
(412) 355-6500
Counsel for Respondent
Joseph Horne Company

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW	1
II. COUNTERSTATEMENT OF THE CASE . . .	2
III. ARGUMENT	
A. The Factual Findings of the District Court Are Not Properly Reviewable by This Court	8
B. Petitioner Here Asks that This Court Reject the Burden of Proof Standard Which It Recently Adopted in Burdine	13
C. Petitioner Has Raised No Question About Which the Circuits Are in Conflict . .	21
IV. CONCLUSION	22

TABLE OF AUTHORITIES

Pages

Cases

Berenyi v. United States, 385 U.S. 630 (1968) 13

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 20

Davis v. United States, 417 U.S. 333 (1974) 21

Marchetti v. United States, 390 U.S. 39 (1968) 20

McDonnell Douglas Corporation v. Green, 450 U.S. 792 (1973) 14

Pullman-Standard v. Swint, et al., ___ U.S. ___, 72 L.Ed. 2d 66 (1982) 10

Smithers v. Bailar, 629 F.2d 892 (3rd Cir. 1980) 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 14, 15, 20

United States v. Johnson, 268 U.S. 220 (1929) 8

I. COUNTERSTATEMENT OF THE ISSUES

1. Should this Court review a factual determination which was made by the District Court and affirmed by the Court of Appeals?
2. Should this Court review a case in which the legal standard applied by the courts below is fully consonant with that recently enunciated by this Court in Texas Department of Community Affairs v. Burdine?
3. Should this Court consider a question which raises, at most, an intracircuit conflict?

II. COUNTERSTATEMENT OF FACTS

Petitioner's Statement of the Case at paragraphs 1, 2 and 5 (Petition at 4-6, 13-14) relating to the legal basis of the suit, the judgment entered by the District Court, and the decision of the Court of Appeals is essentially correct. The following is a counterstatement of the underlying facts of the case relevant to the Petition.

Respondent Hornes operates a number of retail department stores in the Western Pennsylvania area. Petitioner Watts was hired by Hornes to work in the Wig and Millinery Department (the "Wig Department") of the downtown Pittsburgh store ("Downtown Store") on March 24, 1970 (Finding of Fact No. 12; Petition at C-4). Hornes' wig sales were very good during that year, showing a "dramatic" increase over the previous year of 1969. (A-840). However, in each succeeding year, Hornes' wig sales declined steadily.

Net sales in the Wig Department at all Hornes' stores decreased from $376,771 in 1970 to $237,458 in 1971 to $198,699 in 1972 representing a 37% drop in 1971 and a 16.3% drop in 1972. (Finding of Fact No. 27; Petition at C-12). Wig sales in the Downtown Store mirrored this company-wide trend; dollar volume dropped 30.9% in 1971 and 19.4% in 1972. (Finding of Fact No. 27; Petition at C-15). Wig sale at Hornes continued to decline throughout 1973, 1974 and 1975. (Finding of Fact No. 33; Petition at C-15).

In the same period, the "selling costs" for wigs, that is, the wages of salespeople in the Department divided by the volume of sales, increased dramatically. (A-659, A-841). In 1970, the selling costs for the Wig Department at all Hornes' stores were relatively high, 11% of gross sales compared to the overall norm of about 8%. (A-840-841, A-1215). Selling costs in 1971 climbed to 18.1% of sales and

in 1972 increased again to 19.6% of sales. (A-840-841, A-1217, A-1219).

In response to the trend of declining sales and increasing costs in the Wig Department, Hornes' management personnel began to discuss the possibility of making layoffs in January, 1972. (A-984-985). In May, 1972, Hornes' management personnel met to develop budgets for the fall season and, again, the advisability of making layoff in the Wig Department was discussed. (A-986-990). In late May, 1972, a final decision to make layoffs in the Wig Department in the Downtown Store was made at a meeting which included Lawrence Stoneberg, Hornes' Vice President and General Superintendent, based on a projected continuing decline in sales. (A-844-846).

On June 6, 1972, Russell Klapach, the Business Agent for Local 1407 of the Retail Store Employees Union ("Local 1407"), telephoned Robert Neal, Hornes' Manager of Labor

Relations, and advised him of the complaints of Plaintiffs Smith and DiMaio with respect to the discrepancy between the wages they were being paid and that of Watts. (A-485-486). Klapach followed the telephone call with a letter dated June 14, 1972 to Neal. (A-486-487). Klapach testified that at a lunch meeting with Neal on June 26, 1972, Neal remarked to him,"...if Mr. Watts were laid off, we wouldn't have a problem". (A-488).

Following the June 6, 1972 telephone call from Klapach, Neal contacted Stoneberg and informed him of the complaint which Klapach had discussed. Stoneberg told Neal that Neal and he should discuss the complaint in greater detail. Stoneberg also told Neal to inform Klapach that layoffs were pending in the Department and instructed Neal to determine who would be affected by the layoffs. (A-846-847). Neal then told Klapach that layoffs were

imminent due to declining sales. (A-526-527).

The determination of who would be laid off was made at a meeting in late June, 1972 when the seniority list for the Wig Department was reviewed. (A-657). The terms of the collective bargaining agreement between Hornes and Local 1407 required that "extra" employees (those not employed on a full-time, 40 hour per week basis) in a department be laid off first and then that layoffs be made in reverse order of seniority - the least senior being laid off first. (Finding of Fact No. 35; Petition at C-14). Dorys Klein was then the only "extra" in the Wig Department and she was laid off effective July 6, 1972. (Finding of Fact No. 33; Petition at C-14). Howard Watts was the least senior regular employee in the Department and was laid off effective July 8, 1972. (Findings of Fact Nos. 36, 37; Petition at C-14, C-15).

The decline in wig sales continued at Hornes through 1973, 1974 and 1975. (Finding of Fact No. 38; Petition at C-15). As a result of the continued decline, additional layoffs were made in the Wig Department. In June of 1972, ten to twelve persons were employed in the Wig Department at the Downtown Store. (A-280). By June of 1973, that number had been reduced to five or six and during the period of January, 1976 to November, 1979, there were only four employees remaining in the Wig Department at the Downtown Store. (A-280-281). At the time of trial the number had been reduced to three. (A-961). No new employees were hired in the Department subsequent to Watts' layoff. (A-653, A-961).

III. ARGUMENT

A. THE FACTUAL FINDINGS OF THE DISTRICT COURT ARE NOT PROPERLY REVIEWABLE BY THIS COURT.

Petitioner presents two questions for review by this Court. Each of them raises the issue of whether the District Court's factual findings were correct. Thus, the outcome of this case will be changed only if, after a thorough review of the evidence adduced at trial, this Court makes wholesale revisions of the District Court's factual findings.

That the questions presented in this case are based entirely on issues of fact makes this case inappropriate for review by this Court. This Court does not undertake to review the evidence or discuss the facts of a particular case. United States v. Johnson, 268 U.S. 220 (1929). In addition, even if this Court were to undertake such a factual review and, further, if it were to reject the District Court's findings in favor of

its own, the resulting opinion would be so tied to the complex facts of this case that it would be of virtually no precedential value.

The questions raised by Petitioner are two facets of the same issue: whether Petitioner produced sufficient evidence at trial to meet his ultimate burden of proving discrimination. Petitioner outlines certain circumstantial evidence in his argument. The District Court considered this evidence and found it sufficient to make out Petitioner's prima facie case. However, the District Court also considered the economic evidence adduced by Hornes, which was not disputed by Petitioner. The District Court summarized its factual findings[1] on the relevant points as follows:

---

[1]This Court has recently affirmed the proposition that a court's findings related to whether discrimination exists are findings of fact and thus subject to review only under the "clearly erroneous" standard of Rule 52

> Plaintiff Watts made out a prima facie case of a retaliatory firing and discrimination on the basis of sex by presenting evidence that shortly before he was laid off, the Defendant Hornes threatened to lay him off because Plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him.
>
> However, Plaintiff Watts did not carry his burden of persuasion in the face of evidence presented by the Defendant Hornes of greatly declining wig sales and contractual obligations to reduce the work force in order of seniority.

(Conclusions of Law Nos. 4, 5; Petition at C-19).

The District Court differed with Petitioner, not in the evidence it

---

1 cont.
of the Federal Rules of Civil Procedure. Pullman-Standard v. Swint, et al., __ U.S. __, 72 L.Ed. 2d 66 (1982). The Court of Appeals properly refused to find the District Court's factual findings to be clearly erroneous.

considered, but rather in the credibility and weight it gave to that evidence. The District Court compared the probative value of the essentially circumstantial evidence adduced by Petitioner with the probative value of the undisputed economic facts proved by Respondent and found that Petitioner had not met his burden of proof.

The District Court determined that Petitioner was laid off because wig sales had plummeted and because at the time of his layoff he was the least senior employee in his department. (Findings of Fact Nos. 27, 36, 37; Petition at C-12, C-14-15). That the decline in sales was not a pretext for the layoff of Watts is further proved by the fact that, as sales continued to decline after Petitioner was laid off, additional employees were laid off, again in reverse order of seniority as required by the union contract. (Findings of Fact Nos. 38, 39, 40; Petition 4-15). Petitioner

does not dispute these facts. (Petition at 11-12). His sole argument is that the circumstantial evidence which the District Court found sufficient to establish Petitioner's prima facie case was also sufficient to meet his ultimate burden of proof.

Both the District Court and the Court of Appeals have considered Petitioner's argument on this point and rejected it. The District Court not only heard the evidence and observed the witnesses at trial, but also specifically considered Petitioner's argument that a discriminatory motive was a "determinative factor" in the layoff by ruling on Petitioner's Motion to Make Supplemental Findings of Fact and Conclusions of Law. (Petition at 13-14). The District Court denied that motion. (Petition at D-2). Petitioner raised the identical point on appeal, but the judgment of the District Court was affirmed (Petition at A-3) and

Petitioner's Motion for Rehearing was denied. (Petition at B-1).

This Court does not sit to correct facts found by the trial court which were confirmed by the court of appeals in the absence of an exceptional show of error. Berenyi v. United States, 385 U.S. 630, 635 (1968). Petitioner has not shown such error. The plain fact of the matter is that Petitioner was laid off because of the unfortunate realities of the marketplace. This case, which is based on the unchallenged economic facts outlined above, is not appropriate for review by this Court.

B. PETITIONER HERE ASKS THAT THIS COURT REJECT THE BURDEN OF PROOF STANDARD WHICH IT RECENTLY ADOPTED IN BURDINE.

In the context of arguing that he had met his burden of proof before the District Court, Petitioner also argues for his construction of a rule of law which pre-dates the recent

decision of this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Burdine confirmed the concise three-step analysis of cases brought under Title VII established by this Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). That analysis is as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."...Third, should the defendant carry his burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (citation omitted). (emphasis added).

Burdine at 250.

The Burdine court went on to define the standard for the ultimate burden which a plaintiff must meet by explaining that,

> [the plaintiff] may succeed ...either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. (citation omitted). (emphasis added).

Ibid.at 254. Burdine focuses on exactly what the plaintiff must prove in order to overcome the defendant's having articulated a legitimate, non-discriminatory reason. In doing so, this Court clarified an issue which lower courts had confused.[2]

---

[2]A good example of this confusion is the argument in the Petition. Petitioner phrases the questions presented in terms of whether the discriminatory motive was a "substantial factor" in the layoff. (Petition at ii). Petitioner then argues in his Petition for the application of a standard which is met if plaintiff proves the dis-

Although the District Court decision here pre-dated Burdine, it is apparent from its factual findings that the legal standard it applied was in full accord with Burdine.[3]

---

2 cont.
criminatory motive to be "a determinative factor", as discussed below. Petitioner then goes on to state a variety of other standards, some of his own and some which had been articulated by other courts, which include: "made a difference", (Petition at 17-18); "played a part", (Petition at 19); and "at least, in part, a factor", (Petition at 21). The application of any of these standards would alter the burden of proof entirely because, once the plaintiff proved his prima facie case, the defendant would have to prove, for example, that the discriminatory motive was not a factor. Burdine put an end to this confusion.

[3]The District Court's summary of its findings on the relevant issue are quoted in full at page 10, above.

Phrased in the terms of Burdine, the District Court found that Petitioner had proved his prima facie case; that Respondent had articulated a legitimate, non-discriminatory reason for its action; and that Petitioner had failed his ultimate burden of proving that the justification articulated by Respondent was a mere pretext.

Petitioner has not argued that the courts below applied a legal standard to this case which is not consistent with Burdine. Rather, Petitioner asks this Court to adopt his construction of the language of the pre-Burdine decision of the Third Circuit in Smithers v. Bailar, 629 F.2d 892 (3rd Cir. 1980), to the effect that the ultimate burden on the plaintiff is satisfied if he proves that an improper motive was a "determinative factor" in Respondent's decision to lay off Petitioner. He then argues that the circumstantial evidence which he adduced was sufficient to establish that a dis-

criminatory motive was a "determinative factor".[4] (Petition at 17).

In his Petition, Petitioner fails to discuss what changes the adoption of Smithers would bring to the analysis of Burdine. If adopting Smithers as argued by Petitioner would not alter Burdine, then there is no reason for this Court to review this case, for the decisions of the Courts below

---

[4]As discussed at footnote 3, supra., Petitioner has argued for the application of any number of legal standards. However, inasmuch as the District Court found that Petitioner's evidence was insufficient beyond proving a mere prima facie case, Petitioner may prevail here only if this Court adopts a standard whereby a plaintiff may meet his ultimate burden of proof merely by establishing a prima facie case so long as the defendant does not prove that a discriminatory motive was not a factor. This is the antithesis of the Burdine rule.

follow the rule of Burdine. If, however, Petitioner would have this Court revise Burdine, he must justify the reasons for doing so. This he does not do. In fact, Petitioner does not analyze or even cite to Burdine in the Petition.[5]

Petitioner argues that his construction of Smithers is the rule and that the Court of Appeals simply

---

[5]Petitioner seemingly implies that the Smithers rule is only applicable to those Title VII cases involving mixed motives by describing Smithers as a rule to be applied here"...where there is an issue of mixed motives in proving a discriminatory discharge". (Petition at 14-15). Thus, Petitioner argues by implication that Smithers does not conflict with Burdine because it only amplifies the rule as it is to be applied in what it is suggested are the limited number of Title VII cases involving "mixed motives". However, there is at least some question of "mixed motives" in virtually every case in which the plaintiff establishes his prima facie case and the defendant articulates a legitimate non-discriminatory justification. Thus, the "limited number" of cases would, in fact, include every case

failed to apply it. That is not the case. Burdine is the rule and Petitioner can properly seek review by this Court only if either the Court of Appeals misapplied Burdine or if there are positive, compelling reasons to revise Burdine.[6] Petitioner has not attempted to make either argument; he has simply ignored Burdine.

---

5 cont.
in which plaintiff is required to meet his full burden of proof. Petitioner has recognized this fact, but not the anomaly it creates in his argument. (Petition at 16-17). Burdine covers the situation of "mixed motives" precisely by requiring that the plaintiff prove "...that a discriminatory reason more likely motivated the employer..." (emphasis added). Burdine at 254. See also footnote 3, supra.

[6]Burdine was decided in 1981 and thus is not a case ripe for reexamination. See Marchetti v. United States, 390 U.S. 39 (1968). Further, Burdine enunciated a clear and simple rule which has not been the cause of confusion or the subject of scholarly or judicial controversy. See, Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1978).

Because the courts below applied a legal standard in full accord with the prevailing decision of this Court and because Petitioner has not presented any reason that the decision should be reconsidered, it would be inappropriate for this Court to review the case presented.

C. PETITIONER HAS RAISED NO QUESTION ABOUT WHICH THE CIRCUITS ARE IN CONFLICT.

Petitioner, in part, bases his argument for review by this Court on a purported failure by the Court of Appeals to follow its own decision in Smithers, supra. Petitioner argues that "...in view of...the failure of the Court of Appeals to follow its own decisions, review of the decision below is essential". (Petition at 23). However, even if Petitioner had established a conflict between decisions within the Third Circuit, such intracircuit conflicts are not properly resolved by this Court. Davis v. United States, 471 U.S. 333, 340 (1974).

IV. CONCLUSION

For the reasons set forth, Joseph Horne Company respectfully requests that this Court deny Howard Watts' Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

KIRKPATRICK, LOCKHART,
JOHNSON & HUTCHISON

By /s/ Judd N. Poffinberger
Judd N. Poffinberger, Jr.
(Counsel of Record)

Edward J. Van Allen
Rodney G. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit of Respondent Joseph Horne Company were served this 8th day of December, 1982, on counsel for all parties of record by depositing the same in the United States Mail, First Class, postage prepaid, as follows:

Arnold M. Friedman
Edward B. Friedman
Friedman and Friedman
600 Arrott Building
Wood Street and Fourth Avenue
Pittsburgh, Pennsylvania 15219

/s/ Judd N. Poffinberger, Jr.
Judd N. Poffinberger, Jr.